IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 17TH JULY 2007 / 26TH ASHADHA 1929

WP(C).No. 29140 of 2005(R)

OS.595/1999 of PRL.M.C.,ERNAKULAM
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PETITIONER:

JOHN, S/O. GEORGE,
CHINNIKKARA HOUSE, VADUTHALA P.O., REPRESENTED BY JOJO C.J., S/O. JOHN, AGED 39,CHINNIKKARA HOUSE, VADUTHALA P.O., ERNAKULAM.

BY ADV. SRI.ABRAHAM JOHN

RESPONDENTS:
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1. **BHAGYODAYAM COMPANY, CHATHIATH, REPRESENTED BY P.A. PERIGREEN, AGED 67, S/O. ALEXANDER, PAYYAPPILLY HOUSE, VADUTHALA, KOCHI-682023 (MANAGING DIRECTOR).**

2. **ANTONY JOE KEERAMPILLY, AGED 70, S/O. JOSEPH, KEERAMPILLY HOUSE, VADUTHALA, KOCHI-682023.**

3. **GASPER CORREYA, AGED 68, S/O. FRANCIS CORREYA, AMBATT HOUSE, PACHALAM P.O., KOCHI-682 012.**

4. **JOHN BOSCO D'SILVA, AGED 58, S/O. LAWRENCE D'SILVA, ALUNGAPADATH, PACHALAM, KOCHI-682 012.**

5. **JOSEPH ANTONY, AGED 58, S/O. JOSEPH, VALIAPARAMBIL HOUSE, PACHALAM, KOCHI-12.**

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.K.A.SHAJI MATHEW
SRI.M.HARISHARMA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.29140/2005 R

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF MEDICAL CERTIFICATE ISSUED FROM LOURDES HOSPITAL DTD. 21/04/2005.**

EXT.P2: **COPY OF MEDICAL CERTIFICATE WAS ISSUED BY THE PSYCHIATRIST OF KUSUMAGIRI MENTAL HEALTH CENTRE DTD. 6/04/2005.**

EXT.P3: **COPY OF THE APPLICATION DTD. NIL.**

EXT.P4: **COPY OF THE MEDICAL CERTIFICATE DTD. 19/07/2005.**

RESPONDENT'S EXHIBITS:

EXT.R(A): **COPY OF PETITION I.A.NO.5794/2005 IN O.S.NO595/1999 DTD. 5/07/2005 FILED BY THE PETITIONER BEFORE MUNSIFF'S COURT, ERNAKULAM.**

EXT.R(B): **COPY OF AFFIDAVIT DTD. 5/07/2005 FILED BY THE PETITIONER IN SUPPORT OF EXT.R(A).**

EXT.R(C): **COPY OF COUNTER AFFIDAVIT DTD. 13/07/2005 FILED BY THE RESPONDENT IN EXT.R(A).**

EXT.R(D): **COPY OF ORDER DTD. 12/08/2005 IN EXT.R(A) OF THE MUNSIFF'S COURT, ERNAKULAM.**

EXT.R(E): **COPY OF LIST OF DATES AND POSTINGS IN O.S.NO.595/1999 ON THE FILE OF THE MUNSIFF'S COURT, ERNAKULAM.**

/TRUE COPY/

P.A.TO JUDGE

KSS

PIUS C. KURIAKOSE, J.

W.P.(C) NO. 29140 of 2005

Dated this the 17th day of July , 2007

JUDGMENT

This writ petition under Article 227 of the Constitution of India is filed by the defendant in O.S.No.595/1999 on the files of the Principal Munsiff Court, Ernakulam. The respondent is the plaintiff, a company represented by its Managing Director and Trustees. The suit is one for recovery of possession of immovable property and for fixation of boundaries. According to the petitioner, he was a mentally unhealthy person at the time of commencement of the suit and the respondent instituted the suit against him without taking into account that aspect. He submits that when summons was received, his son Mr.Thomas John who was residing along with him being unaware of the legal implications took all the steps to defend the case. He was taken into a counsel and the counsel also entered appearance for him without being aware of the incapability of the petitioner. The counsel later relinquished the vakalath and thereafter the petitioner's son got power of attorney executed by him in his favour and on the strength of the power of attorney, defence of the suit was pursued. Fresh counsel was engaged by the power of attorney holder and therefore

the new counsel did not get an opportunity to see the petitioner. Trial proceeded and on behalf of the respondent one of the trustees ws examined. On the side of the petitioner, the power of attorney holder Sri.Thomas John was examined. The petitioner submits that during the cross examination of Mr.Thomas John, the counsel for the respondent asked questions and elicited answers which throw considerable light on the mental condition of the petitioner and it is stated that the evidence revealed that the petitioner was mentally unfit from the year 1999 till 2005 and that during the above period he used to have intermittent in- balance of mind. It was then only that the present counsel of the petitioner became appraised of the gravity of the situation and accordingly instructed the petitioner's son to produce medical certificate. Ext.P1 medical certificate was so obtained from the Lourdes Hospital. The petitioner relies also on Ext.P2 medical certificate issued by the Kusumagiri Mental Health Centre dated 6.4.2005. Thereafter the petitioner's son filed Ext.P3 application invoking Order XXXII Rule 15 CPC to take the suit off the file on the reason that no guardian had been appointed for the petitioner who was mentally unhealthy. To the application the respondent filed a counter affidavit. The learned Munsiff directed the petitioner to personally appear, which could not be done. Thereafter an

application was filed at the instance of the petitioner. The court directed both sides to submit panel of doctors to examine the petitioner. A Doctor suggested by the respondent was selected and the commission application was allowed for the examination of the petitioner with the help of the above doctor and the petitioner was directed to bear the cost. According to the petitioner being a mentally unhealthy person he is unable to expend necessary amounts and his grievance is that the court below has made an observation that if steps are not taken by the petitioner, adverse inferences will be drawn against him and has now posted the case for hearing. On these averments, the petitioner raise various grounds and prays for following reliefs:

(a). Issue a writ of mandamus or other appropriate writ orders or directions to the principal Munsiff's Court Ernakulam to take off the case OS 595/99 from its files as it has been instituted and proceeded without a guardian to the defendant who is incapable by reason of unsoundness of mind to protect his intent therein.

b). Declare that if adjudication or enquiry regarding the mental infirmity of the defendant is required, it should be at the expenses and costs of the plaintiff and failure if any on the party of the defendant to

take steps for adducing evidence will not result in taking adverse presumption against him.

c). Grant such other relief which is just necessary and proper in the circumstances of the case.

2. A detailed counter affidavit has been filed on behalf of the plaintiff respondent by its Managing Director. It is pointed out that even according to the admissions of the petitioner he is having mental ailments only intermittently. He has no mental ailment at all and his present attempt is only to delay and protract the trial of the suit. The present proceedings were initiated only at a stage after the suit was listed for trial, evidence was completed and the suit posted for hearing. It is contended that the petitioner is guilty of suppressing the various proceedings which have been issued in the suit. I.A.No.5794/2005 was a commission application filed by the petitioner for an order to the issuance of commission to visit him allegedly being treated at the Kusumagiri Mental Hospital and to file a report regarding his condition. Exts.R1(a) and R1(b) are true copies of the above I.A. and affidavit in support of the same. To Ext.R1(a) and R1 (b), the respondent filed R1(c) counter affidavit in the I.A. The court passed Ext.R1(d) order dated 12.8.2005. The grievance of the

petitioner that no enquiry under Rule 15 Order 32 is being conducted though the court was informed about his mental condition cannot be legitimate in the light of Ext.R1(d) order. The counter affidavit points out that for the purpose of conducting a prima facie enquiry, the petitioner was directed to appear in person in the court. Despite repeated orders from the court, he avoided appearance lest, truth should be exposed. The conduct of the petitioner lacks in bona fide. Respondent relies on Ext.R1(e) which is a list of dates and postings of the case so far in the suit. Ext.R1(e), it is contended, will reveal that the petitioner's case of unsoundness of the mind is untrue. It is also contended that ailment which is attempted to be brought out by Exts.P1 and P2, is not of such magnitude as to justify appointment of guardian under Rule 15 of Order XXXII of CPC. It is further contended that an earlier application filed by the petitioner under Order XXXII Rule 15 (2) of the CPC was dismissed as not pressed.

3. I have heard the submission of Sri. Abraham John, the learned counsel for the petitioner and Sri. Shaji Mathew K.A. the learned Counsel for the respondent. Sri.Abraham John would place before me a copy of the deposition of Sri.C.J.Thomas, son of the petitioner and submit that the questions which have been asked in cross examination to the said witnesses will show that the respondent

plaintiff is admitting that the petitioner is a mentally unhealthy person. Under such circumstances, the court below should have seen that the suit as filed now against the petitioner without any guardian to represent him was not maintainable. It is the duty of the respondent/plaintiff to maintain his suit by doing whatever is necessary in that regard and the court below was wrong in insisting that the petitioner should remit charges for the Advocate Commissioner and thereby prove that he was mentally healthy.

4. Sri.Shaji Mathew K.A. refuting the submissions of Sri.Abraham John, invited my attention to Ext.R(d) order passed by the trial court and pointed out that the said order was passed on the basis of an application for commission filed by the petitioner himself. The commission application itself was entertained as part of the enquiry under Order 32 Rule 15 of CPC. Having filed the commission application and secured Ext.R1 (d) order it is not open to the petitioner to contend that the expenditure shall be met by the plaintiff. The learned counsel invited my attention to Ext.R1(e), which is an account of the proceedings in the suit since its filing on 6.4.1999 till 26.10.2003, and submitted that the present case of the petitioner has been invented by him and his son DW1 without bona fides with the objective of protracting the trial of the suit and thereby

defer passage of eviction decree to the maximum extent possible.

5. Having considered the rival submissions addressed at the bar in the light of the materials placed on record and the circumstances which attend on this case, I am of the view that the petitioner is not entitled to have the supervisory jurisdiction of this court invoked in his favour and to have directions passed against the trial court. I am unable to accept the argumentsof Sri.Abraham John that in the cross examination of DW1, who was examined on commission, fatal admissions have been made by the respondent/plaintiff to the effect that the petitioner is mentally unhealthy. Appreciating the testimony of DW1 as a whole it would be seen that the respondent has consistently maintained that the petitioner does not have any mental ailment. It should be remembered that the petitioner on 13.1.2000 on receiving summons entered appearance in court engaging an advocate himself. The petitioner himself on 10.7.2000 filed two applications one seeking enlargement of time to file written statement and another for directing the plaintiff to produce the documents mentioned in the plaint. Those applications have been dismissed. Again the petitioner himself filed two more applications one for further enlargement of Time for filing the written statement and another for production of document by the plaintiff. These applications were allowed by the

court on 7.11.2000 and documents were produced by the plaintiff. On 6.1.2001 the plaintiff filed a petition for temporary prohibitory injunction against the petitioner and the petitioner himself on 3.2.2001 filed a counter affidavit to the same. The petitioner himself filed written statement on 22.5.2001. Apart from that he himself filed an application to set aside the commission report. On 13.6.2001 plaintiff filed a commission application for measurement of the property to which the petitioner himself filed a counter affidavit on 6.8.2001. In the meanwhile, the petitioner directly filed CMA 331/2001 against the order of injunction passed against him by the District Court. That appeal was dismissed and on 19.12.2001 the court allowed commission application filed by the plaintiff. While so, the petitioner changed his lawyer and engaged another Advocate on 25.7.2003. The petitioner himself present in court sought leave to appoint another counsel. On 6.9.2003 he personally filed application for getting certified copy of the plan produced by the plaintiff. Finding difficulty to obtain the services of the Village Officer the court appointed a retired Taluk Surveyor for assisting the Advocate Commissioner. The Commission report is filed. On 10.11.2004. the petitioner who is personally present in the court submitted that he has not received copy of the commission report.

6. It is submitted that the commissioner conducted the inspection in the presence of the petitioner. It is thereafter, the petitioner executed power of attorney in favour of his son on 26.10.2003. Power of attorney is executed in the presence of Advocate and notary Smt.Reziya, who has authenticated the execution.

7. What is stated above will show that if at all the petitioner contracted any mental ailment, the same is only after he executed power of attorney in favour of son. Of course, if it is brought to the notice of the court that a party to the litigation has become incapable of taking care of his interest in the subject matter of the litigation on account of any mental infirmity, an enquiry is envisaged under Rule 15 of Order 32 CPC. It should be remembered that ordinarily what the court is expected to do when it is reported that a party is incapable on account of his mental infirmity to protect his interest in the subject matter of the litigation, is to direct the party to be present in the court so that a voir dire can be conducted. In the instant case inspite of successive directions, the petitioner did not present himself before the court. It was under such circumstances that the petitioner himself filed the commission application which was allowed as per Ext.R(d) order. I do not find any illegality in the direction of the learned Munsiff

that the remuneration for the commissioner and the expert shall be paid by the petitioner himself. After all such payments can be accounted for towards the cost of the suit which ultimately will depend on the final result of the litigation. As already stated, there is no warrant for invoking the visitorial jurisdiction of this court under Article 227 of the constitution in this case.

The writ petition fails and the same is dismissed. The court below is directed to expedite the trial of the suit.

PIUS C. KURIAKOSE,
JUDGE.

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